PP

v.

ZAINAL ARPAN MOLANA

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
ABDUL WAHAB PATAIL JCA
LINTON ALBERT J
[CRIMINAL APPEAL NO: Q-05-146-2006]
2 MARCH 2011

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in a dangerous drug - Whether drugs found were of insignificant size and meant for self consumption - Drugs found in a house occupied by others - Whether there was a failure to establish possession by direct evidence - Custody and control of drugs - Whether established - Whether trafficking charge tainted - Whether prosecution failed to establish a prima facie case*

EVIDENCE: *Information leading to fact discovered - Admissibility of statements - Entries in pocket diary were not made contemporaneously - Whether police acted on prior information - Evidence Act 1950, s. 27*

CRIMINAL PROCEDURE: *Disclosure of information - Statement of accused- Admissibility - Entries in pocket diary were not made contemporaneously - Whether police acted on prior information - Evidence Act 1950, s. 27*

On 17 October 2002 at about 10.30pm the respondent was arrested in front of the Hilton Hotel for acting in a suspicious manner when walking towards a car bearing registration number QSF 57. The police searched the car and found no drugs in it. The police then informed the respondent that he would be detained under s. 3(1) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 for a urine test. According to the prosecution, as the respondent did not want to go to that urine test, he thereupon told the police that he had drugs. His words were "saya ada menyimpan dadah di rumah" ('the Hilton Statements'). Following this lead, the respondent was alleged to have brought the police team to a house at Lot 3640 Taman Rasa Makmur, Petra Jaya and was led to the respondent's bedroom on

A the third floor. Inside the room, the police recovered two syringes from the connected bathroom, and four plastic packets containing substance suspected to be dangerous drugs. Drugs were retrieved from the right side pocket of a shirt which was in the cupboard inside the bedroom. Thereafter, the respondent led the police to
B a store room located on the ground floor of the house and took out a black bag printed with the words 'Felda Security' in which a blue cloth bag was found containing two plastic packets each containing crystalline substance suspected to be drugs and a few other things. Upon analysis by the chemist, all the drugs seized
C were analysed as methamphetamine weighing 197.99 grams. Founded on this set of evidence the respondent was charged with the offence of drug trafficking. The prosecution at the High Court ventilated that the respondent had clear possession of the drugs and had requisite knowledge of the nature of the drugs possessed.
D Further, the combined quantity of the drug exceeded the 'trigger' weight under s. 37(da)(xvi) of the Act and thus was presumed to be trafficking in the drug. The respondent on the other hand submitted that the prosecution had failed to prove a *prima facie* case based on the following factors (i) by perusing the opening
E statement, much rested on the admissibility and credibility of the alleged statement made by him, which fell under s. 27 of the Evidence Act 1950. That being so, the court should not consider the evidence of what happened at the house if the court was not satisfied that the alleged information elicited in front of the Hilton
F Hotel was credible or reliable and (ii) under s. 37(d), the prosecution still had to prove that the respondent was in actual custody or in control of dangerous drugs. The prosecution had failed to prove that the respondent had exclusive use of the bedroom and store room. The learned judge, after applying the
G maximum evaluation test on the evidence adduced by the prosecution found that it had failed to make out a *prima facie* case against the respondent. He was thereupon acquitted and discharged without his defence being called. Hence, this appeal.

H **Held (dismissing the appeal; affirming order of High Court) Per Suriyadi Halim Omar JCA delivering the judgment of the court:**

(1) The learned judge had held that an alleged s. 27 statement made in the house was inadmissible. The Hilton statements
I which were alleged to have led to the discovery of the drugs were also held inadmissible on the grounds that the entries in

the pocket diary were not made contemporaneously and that the police team acted on prior information. The learned judge had applied the right legal principles when arriving at that conclusion. (para 10)

(2) The drugs found came from two locations, namely the respondent's bedroom, which had an attached bathroom, and the store room located on the ground floor of the house. The two sets of drugs were lumped together by the prosecution and the gross weight arrived at by the chemist was 197.99 grams of methamphetamine. The drugs retrieved from a shirt pocket in the bedroom weighed only 2.23 grams thus it was not for trafficking. There was every indication that the latter drugs were meant for self consumption. Its insignificant size would clearly put it outside the reach of the presumption provision of trafficking. Further, that shirt could have been anybody's. If the drugs were in someone else's shirt then it was more likely that it was the owner of the shirt who hid the drugs in it, thus exonerating the respondent of having custody and control of them. Also, if those drugs found in the bedroom were meant for possible self consumption, to deliberately or even erroneously lump them with those found at the store room would seriously taint the trafficking charge. (paras 17 & 18)

(3) With the Hilton statements being held inadmissible, then the testimony adduced by the prosecution that the respondent led the police to the drugs at the store room on the ground floor of that three storey house must be rejected. Nothing incriminating found there could be attributed to the respondent. It would be the police who led him to the store room and there recovered a black bag (P14) from a small compartment in which were retrieved drugs subsequently confirmed to be methamphetamine. Unless there was some evidence that could inculpate the respondent which led to the discovery of the drugs such discovery therefore could be premised on any reason imaginable. Without that incriminating evidence the drugs were merely recovered from the store room in a normal investigation rather than discovered pursuant to the respondent's contribution. (para 20)

(4) The prosecution had failed to establish that the respondent had custody and control of the drugs in his bedroom and also the drugs in the store room. The house was owned by his father in law and *prima facie* was the master of the house. The house was also occupied by no less than 11 persons amongst them his maid, he and his wife, his daughter, the respondent and wife, and the respondent's children. The spectre of all these people, especially with a maid who had access to every part of the house, would add to the whittling away of the respondent's custody and control of the drugs. With the failure by the prosecution to establish custody and control of the drugs, not only will the prosecution fail to establish possession by direct evidence but also by the invocation of the presumption provision. (paras 21 & 22)

(5) Drugs were found nowhere near the respondent when he was initially stopped by the police. At the locations where the police recovered the drugs no second party was seen hanging around or for that matter any transfer of possession of the drugs was in the offing or had taken place. In fact there was no worthy tell-tale or overt act, conduct or evidence to upgrade mere possession to trafficking. On that premise, the prosecution had also failed to establish the ingredient of trafficking. (para 29)

Bahasa Malaysia *Translation Of Headnotes*

Pada 17 Oktober 2002, pada pukul 10.30 malam, responden telah ditangkap di hadapan Hotel Hilton kerana berkelakuan mencurigakan apabila berjalan terhadap sebuah kereta yang nombor daftarnya adalah QSF 57. Pihak polis memeriksa kereta itu tetapi tidak menemui dadah-dadah. Pihak polis kemudiannya memberitahu responden bahawa beliau ditahan di bawah s. 3(1) Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 untuk ujian air kencing. Menurut pihak pendakwaan, oleh kerana responden tidak ingin menjalani ujian air kencing, beliau telah memberitahu pihak polis bahawa beliau mempunyai dadah-dadah. Responden telah menyatakan "saya menyimpan dadah di rumah." ('kenyataan Hilton'). Berikutan itu, responden didakwa telah membawa sepasukan polis kepada sebuah rumah Lot 3640 Taman Rasa Makmur, Petra Jaya dan dibawa ke bilik tidur responden pada tingkat tiga. Di dalam bilik tersebut, polis telah menjumpai dua picagari dari tandas bilik itu serta empat bungkusan plastik yang mengandungi bahan disyaki dadah berbahaya. Dadah-dadah diambil

dari poket kanan sehelai kemeja yang berada di dalam sebuah almari di dalam bilik itu. Selepas itu, responden membawa polis ke satu bilik stor yang bertempat di tingkap bawah dan membawa keluar sebuah beg hitam yang mempunyai perkataan-perkataan 'Felda Security' di mana satu beg kain biru dijumpai mengandungi dua beg plastik yang masing-masing mengandungi bahan berhablur disyaki adalah dadah-dadah. Atas analisis ahli kimia, semua dadah-dadah yang dirampas telah dianalis sebagai methamphetamine yang beratnya adalah 197.99 gram. Mengikut keterangan-keterangan tersebut responden dituduh dengan kesalahan pengedaran dadah. Pihak pendakwaan di Mahkamah Tinggi berhujah bahawa responden mempunyai milikan jelas dadah-dadah dan mempunyai pengetahuan yang perlu mengenai sifat dadah-dadah dimiliki. Seterusnya, kuantiti bergabung dadah-dadah melebihi berat 'trigger' di bawah s. 37(da)(xvi) Akta dan oleh itu dianggap mengedar dadah tersebut. Responden pula berhujah bahawa pihak pendakwaan telah gagal membuktikan kes *prima facie* berdasarkan faktor-faktor tersebut (i) dengan menatapi kenyataan pembukaan, kebanyakannya bergantung kepada kebolehterimaan dan kredibiliti kenyataan yang dibuat oleh responden, yang terjatuh di bawah s. 27 Akta Keterangan 1950. Kerana itu, mahkamah tidak perlu mempertimbangkan keterangan kejadian di rumah jika mahkamah tidak puas hati dengan maklumat-maklumat dicungkil di depan Hotel Hilton adalah kredible atau boleh dipercayai dan (ii) di bawah s. 37(d), pihak pendakwaan masih mesti membuktikan bahawa responden mempunyai jagaan dan kawalan dadah-dadah itu. Pihak pendakwaan gagal membuktikan bahawa responden mempunyai kegunaan khusus bilik tidur dan bilik stor. Yang arif hakim, selepas menggunapakai ujian penilaian maksimum ke atas keterangan yang dikemukakan oleh pihak pendakwaan mendapati bahawa ia telah gagal membuktikan kes *prima facie* terhadap responden. Responden telah dibebaskan dan dilepaskan tanpa pembelaannya dipanggil. Oleh itu, rayuan ini.

Diputuskan (menolak rayuan; mengesahkan perintah Mahkamah Tinggi)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Yang arif hakim memutuskan bahawa kenyataan s. 27 yang dibuat di dalam rumah tidak boleh diterima masuk. Kenyataan Hilton yang didakwa telah membawa kepada penemuan dadah-dadah itu juga diputuskan tidak boleh diterima masuk atas

A alasan-alasan catatan-catatan yang dibuat di dalam buku saku tidak dibuat secara serentak dan pihak polis telah bertindak atas maklumat terdahulu. Yang arif hakim telah menggunapakai prinsip-prinsip undang-undang yang betul apabila membuat keputusan itu.

B

(2) Dadah-dadah ditemui di dua lokasi, iaitu bilik tidur responden, yang mempunyai tandas berhubungan dengannya, dan bilik stor yang bertempat pada tingkat bawah rumah. Dua set dadah tersebut dilonggokkan bersama oleh pihak pendakwaan dan
C berat kasar yang didapati ahli kimia adalah 197.99 gram methamphetamine. Dadah-dadah yang dijumpai di dalam poket kemeja di dalam bilik tidur hanya 23 gram oleh itu ia bukan untuk pengedaran. Terdapat beberapa indikasi bahawa dadah-dadah itu adalah untuk pengambilan sendiri. Saiznya yang
D tidak seberapa jelas menunjukkan bahawa ia terkeluar dari peruntukan anggapan pengedaran. Seterusnya, kemeja itu boleh dimiliki sesiapa pun. Jika dadah-dadah tersebut berada di dalam kemeja orang lain ia mungkin pemilik kemeja itu yang telah menyembunyikan dadah-dadah itu, maka ia melepaskan
E responden dari mempunyai jagaan atau kawalan dadah-dadah itu. Juga, jika dadah-dadah itu dijumpai di dalam bilik tidur adalah untuk kemungkinan pengambilan sendiri, untuk sengaja atau dengan salah mencampurkan mereka dengan dadah-dadah yang dijumpai di dalam bilik stor akan mencemar tuduhan
F pengedaran.

(3) Dengan kenyataan Hilton tidak diterima masuk, testimoni yang dikemukakan oleh pihak pendakwaan bahawa responden telah membawa polis ke dadah-dadah yang dijumpai di dalam bilik
G stor di tingkat bawah rumah tiga tingkat itu mestilah ditolak. Tiada apa-apa yang menunjukkan kesalahan berlaku dijumpai yang boleh dianggap berpunca dari responden. Ia adalah polis yang telah membawanya ke bilik stor dan mendapati satu bag hitam (P14) dari satu ruang kecil di mana dadah-dadah
H dijumpai yang seterusnya dibuktikan sebagai methamphetamine. Melainkan terdapat beberapa bukti yang boleh menuduh responden di mana ia membawa kepada penemuan dadah-dadah penemuan seperti itu boleh didasarkan atas apa-apa alasan yang dapat dibayangkan. Tanpa keterangan yang boleh
I menunjukkan kesalahan, dadah-dadah itu hanya ditemui dari bilik stor di bawah satu siasatan normal dan bukan ditemui dengan campurtangan responden.

(4) Pihak pendakwaan gagal membuktikan responden mempunyai jagaan dan kawalan dadah-dadah di dalam bilik tidurnya dan juga dadah-dadah di bilik stor. Rumah tersebut dimiliki bapa mertuanya dan *prima facie* adalah tuan rumah. Rumah juga diduduki oleh tidak kurang dari 11 orang termasuk pembantu rumah, bapa mertua dan isterinya, anak perempuannya, responden dan isterinya bersama-sama dengan anak-anak responden. Oleh kerana kewujudan orang-orang ini, terutama sekali dengan kehadiran pembantu rumah yang mempunyai akses ke setiap bahagian rumah, mengikiskan lagi jagaan dan kawalan responden ke atas dadah-dadah itu. Dengan kegagalan pihak pendakwaan membuktikan jagaan dan kawalan dadah-dadah itu, pihak pendakwaan bukan sahaja gagal membuktikan milikan melalui keterangan terus tetapi juga melalui penggunaan peruntukan anggapan.

(5) Tiada dadah-dadah dijumpai berdekatan responden apabila beliau mula-mula ditahan polis. Di lokasi-lokasi di mana polis menemui dadah-dadah itu tiada pihak kedua dilihat melepak atau berlakunya pemindahan milikan dadah-dadah. Malah tidak terdapat petunjuk-petunjuk atau perbuatan terbuka, tindakan atau keterangan untuk menaikkan pangkat milikan ke pengedaran. Atas premis itu, pihak pendakwaan juga gagal membuktikan bahan pengedaran.

Case(s) referred to:

Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chandrasekaran & Ors v. PP [1970] 1 LNS 11 HC ***(refd)***
Choo Yoke Choy v. PP [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43 SC ***(refd)***
Francis Antonysamy v. PP [2005] 2 CLJ 481 FC ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Ong Ah Chuan v. PP And Another Appeal [1980] 1 LNS 181 PC ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP lwn. Haling Arala Jimjani [2008] 4 CLJ 163 CA ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***
PP v. Mohd Farid Mohd Sukis & Anor [2002] 8 CLJ 814 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), (da)(xvi), 37A(1)
Drug Dependants (Treatment and Rehabilitation) Act 1983, s. 3(1)
Evidence Act 1950, ss. 8, 27

For the appellant - Noorin Badaruddin; AG's Chambers
For the respondent - Francis Wee; M/s Wee & Partners

[Appeal from High Court, Kuching; Criminal Trial No: 45-02-2003-III]

[Editor's note: For the High Court judgment, please see PP v. Zainal Arpan Molana [2004] 1 LNS 299.]

Reported by Suhainah Wahiduddin

JUDGMENT

Suriyadi Halim Omar JCA:

[1] In this case the learned judge after applying the maximum evaluation test on the evidence adduced by the prosecution found that it had failed to make out a *prima facie* case against the respondent. He was thereupon acquitted and discharged without his defence being called. The appeal came before us and at the end of the hearing we dismissed the prosecution's appeal.

[2] The charge against the respondent reads as follows:

> That you, on 17.10.2002, at about 10.45 pm at Lot 3640, Taman Rasa Makmur, Petra Jaya, in the State of Sarawak, on your own behalf did traffic in a dangerous drug, to wit, 197.99 grammes of methamphetamine, and you thereby committed an offence under s. 39(B)(1)(a) Dangerous Drug Act 1952 and punishable under s. 39B(2) of the same Act.

[3] At the opening stage of her submission before us the learned DPP indicated that she was using a dual prong approach to establish the prosecution's case. For the first approach, she would apply the presumptive provision to establish *mens rea* for the ingredient of possession, and thereafter alluding to s. 2 of the Dangerous Drugs Act 1952 (the Act) to establish the ingredient of trafficking ie, by direct evidence. The alternative was that the respondent by direct evidence had physical possession of the drugs, and to establish the ingredient of trafficking, she would allude to s. 2 of the Act. On the latter ingredient of trafficking,

this approach differed with the one at the High Court, where the DPP there had stated that reliance would be on direct evidence and "on presumption under the Dangerous Drugs" to establish the ingredient of trafficking (see F of the Appeal Record Vol. 2).

[4] Scrutinising the opening address at the High Court, it was obvious that the learned DPP never mentioned that she would lead evidence to establish possession of the drugs by the respondent. The emphasis was more on information supplied by him leading to discovery of the impugned drugs in his house. The brief facts are as follows. On 17 October 2002 at about 10.30pm the respondent together with his wife and mother-in-law were in front of the Hilton Hotel, Kuching, when they were stopped by the police. He was arrested as he was alleged to have acted in a suspicious manner when walking towards a car bearing registration number QSF 57. The police then instructed him to drive the car to the Sarawak Contingent Police Headquarters and upon arrival searched the car. The police found no drugs in it. Whether this was a mere flaw in the interpretation of human psychology by the police, when it mistook the "walking towards the car" as suspicious, exacerbated by the eventual embarrassment of no drugs being found in the car, or linked to some other mischievous reason, we have no idea. The respondent's day got worse when the police then informed him that he would be detained under s. 3(1) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 for a urine test. We felt some intimidation had come into play here as at that stage there was no legitimate reason for him to undergo this test. What started as a suspicious walk had culminated in a journey to the remand centre to await a urine test. The prosecution, through SP6, revealed that as the respondent did not want to go for that urine test he thereupon told the police that he had drugs. His words were as follows: "saya ada menyimpan dadah di rumah (hereinafter to be referred as the Hilton statements)." After those words were uttered he was cautioned in accordance with s. 37A(1) of the Act.

[5] Following this lead, the respondent was alleged to have brought the police team to a house at Lot 3640, Taman Rasa Makmur, Petra Jaya. The respondent said he lived in that house. The police was led to his bedroom on the 3rd floor, and inside the room the police recovered two syringes from the connected bathroom, and four plastic packets containing substance suspected

A to be dangerous drugs (hereinafter this location will be referred as the bedroom area). Drugs were retrieved from the right side pocket of a shirt which was in the cupboard inside the bedroom. The respondent was supposed to have handed over the drugs and the two syringes to the police.

B

[6] Thereafter the respondent led the police to a store room located on the ground floor of the house and took out a black bag printed with the words "Felda Security" (P14). He opened the bag and handed to the police a blue cloth bag containing two C plastic packets each containing crystalline substance suspected to be drugs, a weighing scale carrying the brand "Thinner", a yellow cloth bag printed "Bally" containing one impulse sealer, a travel charger box containing a roll of plastic packets and two keys to apartment No. 1108, Somerset Gateway, Kuching (this location D will hereinafter referred to as the store room drugs).

[7] Upon analysis by the chemist (PW5), all the drugs seized were analysed as methamphetamine weighing 197.99 grams. Founded on this set of evidence the respondent was charged with the offence of drug trafficking. The prosecution called eight E witnesses, including the arresting officer, the chemist, the investigating officer (PW6), and offered witnesses to the respondent. In the course of the hearing the prosecution, after a trial within a trial, failed to have certain remarks made by the F respondent admissible eg, the oral statements "Itulah bilik tidur saya". The rejection of this statement as we saw it, did not destabilise the prosecution's case as there was some evidence to prove that the bedroom was indeed used by the respondent, his wife and children. PW7 ie, the father-in-law was the supplier of that piece of evidence.

G

[8] In its submission, the prosecution at the High Court ventilated that the respondent had clear possession of the drugs, and had the requisite knowledge of the nature of the drugs possessed. Further, the respondent did traffic the drugs. The H combined quantity of the drug far exceeded the "trigger" weight under s. 37(da)(xvi) of the Act and thus was presumed to be trafficking in the drug. This course of action and approach was in consonant with the approach to be undertaken supplied in the opening speech.

I

[9] The respondent on the other hand submitted that the prosecution had failed to prove a *prima facie* case based on the following factors:

(a) by perusing the opening statement, much rested on the admissibility and credibility of the alleged statement made by him, which fell under s. 27 of the Evidence Act 1950. That being so the court should not consider the evidence of what happened at the house if the court was not satisfied that the alleged information elicited in front of the Hilton Hotel was credible or reliable;

(b) the prosecution had suggested that if drugs were found in the bedroom, then the respondent must be guilty. According to the respondent this surely was not the correct proposition of law as looking at the facts of this case, drugs found in the bedroom was an insignificant 2.23 grams. There were many possible inferences that went with it be it in relation to possession or purpose;

(c) the uncontroverted evidence in so far as the bedroom was concerned was that the respondent' s wife and children lived with him. The facts here could not be taken in isolation, and taken cumulatively a reasonable doubt had been created at the prosecution's stage as regards possession;

(d) there were no finger prints evidence on the plastic packets, which contained the substances, and there was no nexus between the drugs and the weighing machine, sealing machine or the travel charger box. There was no evidence of drugs sticking on the items either; and

(e) under s. 37(d), the prosecution still have to prove that the respondent was in actual custody or in control of dangerous drugs. The prosecution failed to prove that the respondent had exclusive use of the bedroom and store room. Without this legal prerequisite established the court could not invoke s. 37(da)(xvi) of the Act. For the latter provision, in a nutshell, any person who is found in possession of 50 grams or more in weight of methamphetamine shall be presumed, until the contrary is proved, to be trafficking in the said drug.

[10] It was obvious from the notes of proceedings that the learned judge had some trying moments with both the prosecution and the defence and had even conducted an unnecessary trial

within a trial. She also had the occasion to hold that an alleged s. 27 statement made in the house was inadmissible. Regretfully for the prosecution, the Hilton statements which were alleged to have led to the discovery of the drugs were also held inadmissible on the grounds that the entries in the pocket diary were not made contemporaneously and that the police team acted on prior information. It was our finding after thoroughly sifting the notes of proceedings that the learned judge had applied the right legal principles when arriving at that conclusion. The reasons had nothing to do with the voluntariness of the statements as s. 27 is silent on this requirement unlike a confession or a cautioned statement (*Francis Antonysamy v. PP* [2005] 2 CLJ 481; *Chandrasekaran & Ors v. PP* [1970] 1 LNS 11).

[11] Perusing the grounds of judgment the learned judge had meticulously considered the opening address and their legal intricacies. She took great pains to state that it was mandatory and incumbent upon the prosecution before opening its case to state, *inter alia*, the proposed evidence to prove the guilt of the respondent and if the prosecution failed to mention an alleged admission, but only introduced it at the trial proper, then the evidence was an afterthought. We have no disagreement with this view either.

[12] Despite the want of mention of the ingredient of possession in the opening speech, the learned judge nevertheless proceeded to consider the strength and weakness of the respondent's possession of the drugs. She eventually held that the prosecution failed to establish the ingredient of possession let alone the trafficking ingredient. Upon reading the grounds of judgment, it was obvious that the learned judged had applied the maximum evaluation test and thereupon concluded that the prosecution had failed to make out a *prima facie* case. There was nothing wrong in this test or eventual decision (*Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; *Balachandran v. PP* [2005] 1 CLJ 85).

The Court Of Appeal's Additional Factual Finding

[13] Having perused the opening speech of the prosecution, it was obvious that the prosecution would rely heavily on the Hilton statements. Section 27 of the Evidence Act 1950 therefore would take the front seat for the prosecution. As it was the prosecution's case was derailed when, proceeding on a finding of fact, the learned judge held those statements as being inadmissible.

[14] It must be understood that the format of her grounds of judgment were "broad grounds" hence the want of a detailed discussion of the s. 27 statements in it but they sufficed. Her reasons were similar to "the grounds as summarised by the learned defence counsel ..." Having read the defence written submissions and the connected evidence found in the notes of proceedings, and simultaneously gauging the approach of the learned judge when arriving at that finding of fact, we failed to disagree with her.

[15] Moving on from there we realised that the decision of the learned judge to hold the statements made in front of the Hilton Hotel as inadmissible would have a profound overall effect on the case of the prosecution. Without that information, the case of the prosecution would take a serious twist, in that instead of the respondent leading the police to the discovery of the drugs the reverse holds true. The overall effect was that the recovery of the drugs even though successful, was instead carried out by the police in their normal course of investigation rather than discovered as a result of the respondent's information.

[16] It was undeniable that the drugs found came from two locations, namely the respondent's bedroom, which had an attached bathroom, and the store room located on the ground floor of the house. The two sets of drugs were lumped together by the prosecution and the gross weight arrived at by the chemist was 197.99 grams of methamphetamine. Needless to say the drugs retrieved from a shirt pocket in the bedroom, which weighed only 2.23 grams, would not have been sufficient to attract the presumptive provision of s. 37(da)(xvi) of the Act.

[17] Regardless of the finding of the learned judge regarding the issue of possession at p. 861, we also undertook our own exercise pertaining to this ingredient. With there being another person living in that bedroom ie, the wife, could we safely say that the drugs were not hers ie, discounting any possession by the respondent? In *Gooi Loo Seng v. PP* [1993] 3 CLJ 1 Edgar Joseph Jr SCJ quashed the conviction on the grounds *inter alia* that the drugs could have been hidden by others, especially the girlfriend, who had access to the room and hidden the drugs there when the accused person was absent. We also had to bear in mind that 11 people lived in that house, inclusive of his father-in-law, mother-in-law and the maid. When probed by us whether that shirt was owned by the father-in-law the learned DPP conceded

A that such a possibility was never eliminated at the High Court. When we pursued the matter and posed the follow up question of whether the shirt (P29) was actually a lady's blouse, after having sight of the pictures, as it "looks like a female shirt", again the learned DPP could not confirm it either way. In a word that
B shirt could have been anybody's. If it was the respondent's drugs there was no reason for him to hide them in a shirt possibly owned by someone else, regardless of the sex, and thus risk the drugs being discovered. Putting it another way, if the drugs were in someone else's shirt then it was more likely that it was the
C owner of the shirt who hid the drugs in it, thus exonerating the respondent of having custody and control of them. Without these two ingredients being successfully established the issue of mens rea related to possession will not be triggered: the stage of possession can only be considered after the custody and control
D hurdle have been cleared.

[18] Even if the learned judge had decided in favour of the prosecution regarding the Hilton statements, and even if the respondent had custody and control of the drugs found in the
E bedroom, we were not convinced that the 2.23 grams of methamphetamine were for trafficking. There was every indication that the latter drugs were meant for self-consumption. The first indication was, if the 2.23 grams drugs were meant for trafficking, why were they found at quite a distance from the larger amount
F found at the store room? Is insignificant size would clearly put it outside the reach of the presumption provision of trafficking.

[19] And then there were the syringes which were found in the bathroom. These two syringes were not new and had been used
G at some point of time as the chemist found traces of ephedrine in them. In the course of the cross-examination SP6 admitted that those syringes were for drug taking (Q: Mengikut pengalaman kamu syringe itu untuk apa? J: Untuk mengambil dadah). It is undeniable that that there was some evidence supplied by the
H prosecution through SP6 (p. 680 of the Appeal Record) to establish the respondent as a drug taker. On the above reasoning there was a high degree of probability that those syringes were part of his paraphernalia, and the 2.23 grams of methamphetamine were set aside to satisfy his drug cravings. To wind it up, if those

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drugs found in the bedroom were meant for possible self-consumption, to deliberately or even erroneously lump them with those found at the store room would seriously taint the trafficking charge. No amount of explanation by the prosecution could save the tainted charge.

[20] We now discuss the drugs found at the store room. With the Hilton statements being held inadmissible, then the testimony adduced by the prosecution that the respondent led the police to the drugs at the store room on the ground floor of that three storey house, must be rejected. Nothing incriminating found there could be attributed to the respondent. It would be the police who led him to the store room and there recovered a black bag (P14) from a small compartment in which were retrieved drugs subsequently confirmed to be methamphetamine. There the police seized some other items too. Unless there was some evidence that could inculpate the respondent which led to the discovery of the drugs such discovery therefore could be premised on any reason imaginable. Without that incriminating evidence the drugs were merely recovered from the store room in a normal investigation rather than discovered pursuant to the respondent's contribution.

[21] In order to establish the ingredient of possession of the drugs found at the store room (and the bedroom on the third floor), and hence having the requisite *mens rea*, be it by direct evidence or the invocation of the presumption provision, the prosecution must first of all cross the hurdle of having established custody and control of them. From the set of facts, not only did the prosecution fail to establish that the respondent had custody and control of the drugs in his bedroom but also the drugs in the store room. For starters, the house was owned by his father-in-law and *prima facie* was the master of the house, together with its contents eg, P14 from which drugs were recovered. Evidentially P14, a bag that held the words "FELDA Security", seized by the police in the store room and from which were retrieved the main bulk of the drugs and other items eg, the "Thinner" weighing scale, a yellow cloth bag carrying the brand "Bally", an impulse sealer and the like, was admitted by PW7 to be his (see Record of Appeal p. 764). With P14 being his, why the latter was not individually charged or jointly charged with the respondent was a mystery to us. He (PW7) also in clear terms testified that the

A house was occupied by no less than 11 persons amongst them his maid, he and his wife, his daughter, the respondent and wife, and the respondent's children. The spectre of all these people, especially the maid running loose in the house as she would have access to every part of the house, which would include the store
B room when doing her chores, would add to the whittling away of the respondent's custody and control of the drugs. In *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 Abdul Hamid Omar LP quashed the conviction of the accused person as the prosecution had failed to prove that the accused had exclusive
C custody and control of the drugs found in the room where there were at least three others with access to the room. In the current appeal with 11 people having access to the store room and the s. 27 statement by the respondent having been decided to be inadmissible the ingredients of custody and control thus were still
D at large (see also *Gooi Loo Seng v. PP* [1993] 3 CLJ 1). In *Choo Yoke Choy v. PP* [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43 Anuar J (as he then was) when delivering the decision of the Supreme Court *per curiam* said:

E > Without the evidence of custody or control, the presumption of possession under s. 37(d) of the Act cannot arise.

[22] With the failure by the prosecution to establish custody and control of the drugs, not only will the prosecution fail to establish possession by direct evidence but also by the invocation of the
F presumption provision.

[23] In order to establish the ingredient of trafficking of the 197.99 grams of methamphetamine (which included the 'tainted' amount of 2.23 grams meant for personal consumption), the
G prosecution before us alluded to the provision of s. 2 of the Act. For the sake of argument, if indeed the prosecution had established the ingredient of custody and control and possession, the proving of the ingredient of trafficking is a totally different matter. The learned DPP in her written submission picked out
H keeping, concealing and storing in order to bring the respondent squarely within s. 2 of the Act. The definition of trafficking reads thus:

I > "trafficking" includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering,

transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations, made under the Act;

[24] Without the need of repeating any previous discourse of this section, what needs to be repeated are the established enunciations by recent authorities, which demand something more than passive possession before the ingredient of trafficking is said to have been established. In *Ong Ah Chuan v. PP And Another Appeal* [1980] 1 LNS 181 Lord Diplock when defining 'traffic' said:

> **"To traffic" in a controlled drug so as to constitute the offence of trafficking** under section 3 involves something more that passive possession or self-administration of the drug; it **involves doing or offering to do an overt act** of one or other of the kinds specified in paragraph (a) of the definition of "traffic" and "trafficking" in section 2. Even apart from any statutory definition, the ordinary meaning of the verb "to traffic", in the particular context of trafficking in goods of any kind, imports the existence, either in fact or in contemplation, of at least two parties: a supplier and a person to whom the goods are to be supplied. This concept, **involving transfer of possession**, is reflected in the statutory definition itself ...
>
> This is a very wide description of acts that may be treated as equivalent to the substantive offence of trafficking; nevertheless, in their Lordships' view, it is clear from the structure of the Drugs Act and the distinction drawn between the offence of having a controlled drug in one's possession and the offence of trafficking in it, that mere possession of itself is not to be treated as an act preparatory to or in furtherance of or for the purpose of trafficking so as to permit the conviction of the possessor of the substantive offence. *To bring the provisions of sections 10 and 3(c) into operation some further step or overt act by the accused is needed, directed to transferring possession of the drug to some other person* ... (emphasis added)

[25] Augustine Paul J in *PP v. Mohd Farid Mohd Sukis & Anor* [2002] 8 CLJ 814 referring to the above case endorsed the existence, either in fact or in contemplation, of at least two parties: a supplier and a person to whom the goods are to be supplied. *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129 too had referred and agreed with the above case of *Ong Ah Chuan v. PP*.

[26] Distilling the above cases, to constitute the ingredient of trafficking would involve the doing or offering to do an overt act by the trafficker and would involve at least two parties. That activity would also involve the transfer of possession from a supplier and a person to whom the goods are to be supplied. No evidence of the existence either, in fact or in contemplation of two parties, of the distribution of the drugs have been adduced. At best there was only mere possession of them (of which ingredient was also not established).

[27] The prosecution made much of the conduct (s. 8 of the Evidence Act 1950) of the respondent to establish that overt act. He was said to have cried, hugged and begged PW6 at the store room. These alleged acts happened when he was with the police but yet no family members who were present were called to confirm these dramatic acts. In fact these events were never recorded in the police pocket book although PW6 admitted that important matters would be recorded.

[28] Chronologically in this case the respondent neither attempted to escape when stopped in front of the hotel or when drugs were found in his bedroom, and only broke down after drugs were found outside his room. For the sake of analogy, in a drug trafficking case, where an accused person attempts to flee upon seeing the police, such conduct becomes irrelevant if his action was the result of other causes (*Parlan Dadeh v. PP* [2009] 1 CLJ 717). In this case his dramatic behaviour therefore could be construed either way as he could also have been concerned for his family after the drugs were recovered in the store room or perhaps realised that something amiss had taken place for no fault of his (*Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1).

[29] To wind up on this trafficking ingredient, drugs were nowhere found near him when initially stopped by the police. At the locations where the police recovered the drugs no second party was seen hanging around or for that matter any transfer of possession of the drugs was in the offing or had taken place. In fact there was no worthy tell-tale or overt act, conduct or evidence to upgrade mere possession to trafficking (*PP lwn. Haling Arala Jimjani* [2008] 4 CLJ 163). At best there was only passive possession of the drugs (an ingredient which the prosecution also failed to establish). On that premise we were satisfied that the prosecution had also failed to establish the ingredient of trafficking.

[30] With the failure of the prosecution to establish custody, control and possession of the drugs, together with the ingredient of trafficking, let alone the charge being defective as it included the drugs meant for self-consumption, we had no hesitation in dismissing the appeal. The High Court order was thereupon affirmed.